IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2622 of 2003
with
SPECIAL CIVIL APPLICATION No 2625 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NUTANBHAI CHHAGANBHAI BHARWAD

Versus

DISTRICT COLLECTOR

Appearance:
Mr.M.K.Vakharia with Mr.K.G.Vakharia for petitioners in both the matters.
Mr.Arun D.Oza, ld.Govt.Pleader for respondent No.1 in both the matters.
Mr.Vijay H.Patel and Mr.Asim J.Pandya for respondent No.2 in SCA No.2622 of 2003 & SCA No.2625 of 2003 respectively.

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE SHARAD D.DAVE

Date of decision: 21/03/2003

CAV COMMON JUDGEMENT

(Per : MR.JUSTICE KSHITIJ R.VYAS)

The petitioners, in these petitions, challenge the notice Annexure.A dated 5.3.2003 issued by the District Collector, Ahmedabad, the first respondent herein, under Section 38 read with Section 11 of the Gujarat Municipalities Act, 1963 ("the Act" for short). Both the petitioners have sought a writ of prohibition against the first respondent, in proceeding with the application filed by the second respondents in both the petitions. According to the petitioners, the proceedings initiated by the first respondent is without competence, authority or jurisdiction and contrary to the provisions of law and also malafide.

Since common question question of law is involved in these matters, both the petitions are heard together and are disposed of by this common judgment.

2. Having heard the matter at length, with the consent of the learned Counsel appearing for the parties, we have decided to dispose of both these matters finally. In view of this, we formally issue Rule in the matters. Learned Govt. Pleader Mr.Arun D.Oza waives the service of Rule on behalf of respondent No.1 while learned Counsel Mr.Vijay H. Patel and Mr.Asim J.Pandya waive the service of Rule on behalf of respondent No.2 in Special Civil Application No. 2622 of 2003 and in Special Civil Application No.2625 of 2003, respectively.

3. The petitioners and second respondents were contesting candidates from Ward No.4 and Ward No.6, respectively, of Bavla Municipality for which the election was held on 16th February 2003. Both the petitioners were contesting as Congress candidates and the second respondents were contesting as BJP candidates. It is averred in the respective petitions that in Ward No.4, there are three seats out of which, one seat is reserved for woman belonging to Bakshi Panch and in Ward No.6, there are three seats out of which, one seat is reserved for woman belonging to Scheduled Caste. In the aforesaid election, there were three candidates including the petitioners sponsored by Congress and three candidates sponsored by BJP and all the three Congress candidates of respective Wards won the election defeating BJP candidates. It is further averred by the petitioners that since the term of the previous term of the Bavla Municipality has come to an end on 24th January 2001, the State Government, instead of holding election, had

appointed Administrator with effect from 25th January 2001 and accordingly, the Municipality is under Administrator with effect from 25th January 2001 till the date of filing of the petitions since the newly elected body, in pursuance of the general election of the Municipality held on 16th February 2003 had not come into effect. According to the petitioners, in the general election held on 16th February 2003, the Congress won 14 seats, BJP won 12 seats and an independent candidate won one seat. After the publication of the names of the persons who have been declared elected, the first respondent issued notice dated 4th March 2003 giving intimation to all the elected Councillors regarding the first meeting of the newly elected General Board of the Bavla Municipality to hold election of the President and Vice President on 10th March 2003 at 3.00 p.m. This notice was received by the petitioners on 5th March 2003 at about 2.30 p.m. After the said notice, the petitioners received the notice Annexure.A on 5th March 2003 at 6.30 p.m. issued by the first respondent. According to the petitioners, the notice Annexure.A is in pursuance of the application purported to have been filed by the second respondents under Section 38 read with Section 11 of the Act, on 27th February 2003. By the said notice, the first respondent fixed the date of hearing on 7th March 2003, which is impugned in these petitions.

On perusing the application filed by the second respondent, in Special Civil Application No.2622 of 2003, it may be seen that an allegation is made against the petitioner that while he was the President of the Municipality, in the previous term, he has caused loss to the extent of Rs.18,75,967/- to the Municipality. The Director of Municipalities had in fact passed an order dated 15.11.2002 to recover the said amount after deducting Rs.2,40,000/- from the petitioner.

The second respondent, in Special Civil Application No.2625 of 2003, in his application, has alleged that the petitioner is having interest in the transaction with his son and that the petitioner has favoured his son by granting Tender of the Water Department. It is further alleged that the petitioner as well as his son are the members of joint family and have joint financial transactions.

Accordingly, the second respondents of both the petitions have prayed before the Collector to pass an order disqualifying the petitioners as Councillors and also to declare that they are not entitled to take part

in the election of the President of the Municipality.

On receiving the notice Annexure.A, the petitioners applied for adjournment for the purpose of filing the reply. It appears that the application for adjournment was rejected and the first respondent has decided to proceed with the hearing. The petitioners have accordingly approached this Court challenging the notice Annexure.A seeking writ of prohibition restraining the first respondent in proceeding with the notice Annexure.A.

4. Learned Counsel Mr.Vakharia for the petitioners, after inviting our attention to the relevant provisions of the Act, submitted that the notice Annexure.A is without competence and jurisdiction in view of the fact that the term of the office of the petitioners as Councillor will commence from the date of the first meeting of the General Body of the Municipality, i.e. 10th March 2003. Developing the point, learned Counsel submits that for any disability as mentioned in Clauses (a), (b), (c) and (d) of sub-section (1) of Section 38 of the Act, the Collector can initiate proceedings only after the commencement of the term of the Councillor and not prior to the commencement of the term of the Councillor. He also challenges the notice Annexure.A on the ground of malafides. In the submission of learned Counsel, the notice Annexure.A has been given with a malafide intention and with ulterior motive to tilt the balance in favour of BJP which failed to win majority in Bavla Municipality. Learned Counsel submits that respondent No.1 is acting under political pressure to help the Ruling Party, i.e. BJP, which is evident from the following facts:

"(A) Though the application under Section 38 read with Section 11 was given on 27th February 2003, the respondent No.1 has preferred to give notice dated 5th March 2003 after fixing the date of the first meeting for the purpose of election of the President and Vice President.

(B) It is pertinent to note that both the notices at Annexures.A and B were served upon the petitioner only on 5th March 2003.

(C) In the notice at Annexure.A the first respondent had fixed the date of hearing

on 7th March 2003 which is Friday. 8th of March and 9th of March 2003 are public holidays and the first meeting of the General Body of the Municipality is fixed on 10th March 2003. The aforesaid timings are fixed in such a manner so as to deprive the petitioner of any lawful remedy in case if any adverse order is passed against the petitioner on 7th March 2003.

(D) The fixation of date 7th March 2003 is deliberate so as to make a show that there is a compliance with the principles of natural justice and to deprive the petitioner of any remedy against any adverse order which may be passed either on 7th or on 10th (i.e. before the scheduled time of the meeting)."

Learned Govt.Pleader Mr.Arun Oza appearing on behalf of respondent No.1 in both these matters, after placing reliance on the decision of this Court in the case of Patel Chandrikaben Dineshbhai & ors. v. Director of Municipalities & Anr., reported in 1999(2) GLH 306, submits that the petitions are against the show cause notice and therefore, this Court may not entertain the same. He further submits that even though both the petitioners have applied for time before the first respondent for the purpose of filing the reply on the ground that their lawyer is not available, they filed the present petitions before this Court and obtained orders on 7th March 2003 and therefore, even on this ground also, the petitioners are not entitled to claim any relief. Learned Govt.Pleader, by inviting our attention to the decision in the case of Rammayya Venkat Narsu Bura v. The State of Bombay and anr., reported in AIR 1960 Bombay 46, submits that, disqualification of both the petitioners was in existence and continued and by not mentioning the same while filing the nomination, they have suppressed the material fact and therefore, the first respondent was justified in issuing the notice.

Learned Counsel for respondent No.2 submits that the State Government is entitled to initiate proceedings under Section 11 of the Act in view of the fact that from the date of the result of the election, the petitioners have become Councillors. According to the learned Counsel, even if the remedy of filing election petition is available, second respondents in both these matters have justified in approaching the State Government under

Section 38 read with Section 11 of the Act.

5. Dealing with the preliminary contention regarding the maintainability of the petitions, since they are against the show cause notice, we may point out that in ordinary circumstances, this Court could have rejected the petitions being at the show cause stage. We endorse the view expressed by this Court in the decision rendered in the case of Patel Chandrikaben Dineshbhai & ors. v. Director of Municipalities & anr., reported in 1999(2) GLH 306. However, considering the averments made in the petitions, and having considered the question regarding the competence of the first respondent to issue the notice, we issued notice in Special Civil Application No. 2622 of 2003 to the respondents on 7th March 2003 and directed respondent No.1 not to implement adverse orders, if any, that may be passed in the proceedings pending before him in pursuance of Annexure.A till 11.3.2003.

6. There is no dispute to the fact that the first respondent has decided the application in absence of the petitioners by refusing to grant the prayer for adjournment and has in fact presented before us the orders in a closed envelope. Once the decision is already taken in the proceedings initiated against the petitioners, no useful purpose will be served in relegating the petitioners to the State authority. Therefore, we have decided to entertain the petitions. Under the circumstances, the preliminary contention regarding the maintainability raised by learned Govt. Pleader is not available to him.

7. Since the petitioners have challenged the impugned notice on the ground that the Collector can initiate proceedings only after the commencement of the term of the Councillor and not prior to the commencement of the term of the Councillor, it is necessary to refer to certain provisions of the Act. Section 2(4) of the Act defines the "Councillor" means, a member of the Municipality in a municipal borough. Section 8 of the Act deals with the duration of the Municipalities and the Councillors, which reads as under:

"8. Duration of municipalities and the councillors.-(1) Every municipality, unless sooner dissolved shall continue for five years from the date appointed for its first meeting and no longer.

(2) The term of the councillors shall be co-extensive with the duration of the

municipality.

(3) An election to constitute a municipality shall be completed before the expiry of its duration specified under sub-section (1)."

Section 11 refers to general disqualification for becoming a Councillor. Vacation of seat. Decision of State Government in case of disputes.

Section 14 of the Act, which is relevant for our purpose, reads as under:

"14. Determination of validity of elections.-(1) If the validity of any election of a councillor is brought in question by any person qualified to vote at the election to which such question refers or by any candidate for such election such person may, at any time within fifteen days after the date of declaration of the result of the election, apply to the District Court of the district within which the election has been or should have been held, for the determination of such question.'

Section 38 of the Act under which the powers have been exercised by the first respondent provides for disabilities from continuing as a councillor. The said Section reads as under:

"38. Disabilities from continuing as a councillor.-(1) If any Councillor during the term for which he has been elected or nominated--

(a) becomes subject to any dis-qualification specified in section 11, or

(b) acts as a Councillor in any matter--

(i) in which he has directly or indirectly, by himself or his partner, any such share or interest as is described in clause (i), (ii), (iii), (v) or (vii) of sub-section (3) of Section 11, whatever may be the value of such share or interest, or

(ii) in which he is professionally interested on behalf of a principal or other person, or

(c) is professionally interested or engaged in

any case for or against the municipality, or

(d) departs beyond the limits of the State with the declared or known intention of absenting himself continuously for a period exceeding six months,

he shall subject to the provisions of sub-section (2) be disabled from continuing to be a Councillor and his office shall become vacant.

(2) In every case, the authority competent to decide whether a vacancy has arisen shall be the Collector. The Collector may give his decision either on an application made to him by any person or on his own motion after giving the Councillor a reasonable opportunity of being heard.

(3) Until the Collector decides under sub-section (2) that the vacancy has arisen, the Councillor shall not be disabled under sub-section (1) from continuing to be a Councillor.

(4) Any person aggrieved by the decision of the Collector may, within a period of fifteen days from date of such decision, appeal to the State Government and the orders passed by the State Government in such appeal shall be final."

On reading the aforesaid provisions, it is clear that the term of the office of the Councillor is co-extensive with the duration of the Municipality and every municipality, unless sooner dissolved shall continue for five years from the date appointed for its first meeting and no longer. Since the term of the office of the Councillor is co-extensive with the term of the Municipality, it is obvious that it commences from the date of the first meeting for a period of five years.

There is no dispute to the fact that the meeting for the election of the President and Vice President of Bavla Municipality is scheduled to be held on 10th March 2003, as can be seen from the communication dated 7th March 2003 issued by the first respondent. Thus, the petitioners who have, admittedly, contested the general election of the Councillors in the election held on 13.3.2003 and having been elected as Councillors, the term of the Councillor has not commenced when the impugned notice Annexure.A was served upon them by the first respondent. On the plain reading of Section 38 of

the Act, it is clear that if any Councillor during the term for which he has been elected or nominated, becomes subject to any dis-qualification specified in Section 11 or acts as a Councillor in any matter stated therein, shall, subject to the provisions of sub-section (2) be disabled from continuing to be a Councillor and his office shall become vacant.

Thus, on plain reading of Section 38, it is clear that with regard to any disability as mentioned in Clauses (a), (b), (c) and (d) of sub-section (1) of Section 38 of the Act, the Collector can initiate proceedings only after the commencement of the term of the Councillor and not prior to the commencement of the term of the Councillor. In this view of the matter, assuming that both the petitioners incurred disqualification as specified in Section 14 of the Act, they could have been dealt with under Section 11 of the Act by way of election petition. In any case, invoking power under Section 38 of the Act against the petitioners, in our opinion, is totally uncalled for as the same can be commenced at any time during the term of the office of the Councillor. In this behalf, we are supported by the decision of the Full Bench of the Bombay High Court in the case of Dattatraya Narhar Pitale v. Prabhakar Dinkar Gokhale and anr., reported in AIR 1975 Bombay 205 wherein, while interpreting Section 44 of the Maharashtra Municipalities Act, which is para-materia to Section 38 of the Gujarat Municipalities Act, it is held that, for challenging the validity of an election, petition has to be presented under Section 21 (Section 14 of the Gujarat Act), within ten days after the publication of the names of the Councillor while petition under Section 33 can be taken at any time during the term of the office of a Councillor. In view of this, we are of the opinion that the first respondent has committed an error in issuing the notice Annexure.A against the petitioners before commencement of their term as Councillors. Needless to say that, we do not find any merit in the submission advanced on behalf of the second respondents also that the State can decide the general disqualification for becoming Councillor under Section 11 of the Act. We, accordingly see substance in the submission of learned Counsel for the petitioners. In this view of the matter, the notice at Annexure.A is required to be set aside, by holding that the same is without competence, authority and jurisdiction.

8. Since we are allowing these petitions on the first contention being a question of law, in our opinion, it is not necessary for us to go into the question of

malafides. This is in view of the fact that the possibility of committing error of law by the first respondent cannot be ruled out. Besides, we have returned the envelope containing the orders passed by the Collector without opening the same and the possibility of rejecting the application of the second respondents by the first respondent also cannot be ruled out.

9. In the result, both these petitions are allowed. We quash and set aside the notice at Annexure.A in both these petitions and we further direct respondent No.1 not to implement the adverse order, if any, in the proceedings pursuance to the notice at Annexure.A. The said respondent is further directed to call the first meeting of the General Body of Bavla Municipality by issuing a fresh notice in accordance with law. Rule is made absolute. There shall be no order as to costs.

(Kshitij R. Vyas, J.)

(Sharad D. Dave, J.)

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